

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: § CASE NO. 20-33948-11
FIELDWOOD ENERGY, LLC, § HOUSTON, TEXAS
ET AL § FRIDAY,
DEBTORS. § JULY 9, 2021
§ 10:04 A.M. TO 11:22 A.M.

AMENDED MOTION HEARING (VIA ZOOM)

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE
COURTROOM DEPUTY: TYLER LAWS

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ALSO PRESENT:

MIKE DANE

(Please also see Electronic Appearances.)

HOUSTON, TEXAS; FRIDAY, JULY 9, 2021; 10:04 A.M.

2 THE COURT: All right. And now we're going to call
3 the Fieldwood Energy case. It's 20-33948.

6 MR. DUEWALL: Good morning, Your Honor. Craig
7 Duewall on behalf of BP, here, Your Honor, and prepared to
8 argue BP's motion to compel arbitration, as well as BP's
9 motion to quash the 2004 discovery request that had been
10 served.

11 THE COURT: Thank you, Mr. Duewall.

12 Mr. Genender?

13 MR. GENENDER: Your Honor, Paul Genender. Good
14 morning, Your Honor. Paul Genender, Weil, Gotshal & Manges,
15 for the Debtors. I'm here with Mr. Perez and Ms. Choi and to
16 respond to the motions that Mr. Duewall just referenced, and
17 also to respond to the motion brought by Shell, in connection
18 with the 2004.

19 THE COURT: Thank you.

20 Mr. Manns, let me get your line active.

21 MR. MANNS: Sorry.

22 THE COURT: Mr. Manns, good morning. Let's try that
23 now.

24 MR. MANNS: Right. Good morning, Your Honor. Ryan
25 Manns, Norton Rose Fulbright, on behalf of Shell Offshore,

1 Inc.

2 THE COURT: Thank you.

3 Mr. Perez.

4 (No verbal response)

5 THE COURT: Mr. Perez?

6 MR. PEREZ: Good morning, Your Honor. Alfredo
7 Perez.

8 THE COURT: Good morning.

9 All right. Have you all talked about what order you
10 want to take things in? Why don't we start --

11 MR. GENENDER: We have not --

12 THE COURT: Let's start with the arbitration matter.

13 MR. GENENDER: Thank you, Your Honor. That was our
14 preference, to start with that motion, as well.

15 THE COURT: All right. Mr. Duewall.

16 MR. DUEWALL: Thank you, Your Honor.

17 First on the docket today is BP's motion to compel
18 arbitration. That motion is found at Docket Reference Number
19 1414, for the Court's convenience. Fieldwood's response has
20 been filed at Docket Number 1795. And this morning, we filed
21 a reply at Docket Number 1844.

22 As a housekeeping matter, before we begin arguing
23 the motion, Your Honor, attached to our motion as exhibits --
24 are certain exhibits in support of the motion. Those are
25 referenced at document -- Docket 1414-3 to 1414-12. We've

1 also filed them in conjunction with our witness statement and
2 exhibit lists for the Court at Docket 1820-2 to 1820-12.

3 We've conferred with opposing counsel before the
4 hearing. It's my understanding that we have a stipulation to
5 admit those exhibits, as well as the exhibits that they have
6 referenced in their exhibit list and as exhibits. And so I
7 would just move now, before we begin, to admit those for the
8 Court.

9 THE COURT: All right. I have an offer of 1820-2 to
10 1820-12. Any objections?

11 MR. GENENDER: Your Honor, Paul Genender for the
12 Debtors.

13 No objection. Just to put a finer point, and maybe
14 we can do it all at once, the Debtors' exhibits are 1821-1
15 through 11.

16 THE COURT: Any objection to those, Mr. Duewall, or
17 anyone else?

18 MR. DUEWALL: No objection, Your Honor. And we'd
19 also ask the Court to take judicial notice of any other
20 pleadings that we might reference, the disclosure statement or
21 otherwise, that are in the Court's record. But we can address
22 those in due course if we need to.

23 THE COURT: I'm admitting 1820-2 to 12 and I'm
24 admitting 1821-1 to 11.

25 (BP Exhibits 1820-2 through 1820-12 received in evidence)

1 (Debtors' Exhibits 1821-1 through 1821-11 received in
2 evidence)

3 THE COURT: We will take judicial notice of the
4 filing, but not of the truth of any matter that is filed with
5 the Court.

6 MR. DUEWALL: Thank you, Your Honor.

7 As background to the motion to compel arbitration,
8 this is a motion to compel arbitration with regard to the
9 agreement at issue, that being the Loop Subsea operating
10 agreement. That is the Court's record 1820-2, specifically,
11 Section 22.28, titled "Dispute Resolution Therein." That's
12 found on Page 59 of 193 of that document in the Court's
13 record.

22 We've separately filed, just so it's easier to find,
23 Your Honor, Exhibit F in the Court's record at 1820-3.
24 Exhibit F, much like the provision that I've just cited, is a
25 very broad arbitration agreement that governs the parties'

1 disputes or any disputes that the parties might have related
2 to or arising out of the loop system.

3 Specifically, on Page 1 of Exhibit F, it generally
4 states that arbitration, as used in this (indiscernible)
5 statement is a procedure, whereby the arbitrator resolves any
6 claims, controversies, or disputes -- and that's defined as a
7 dispute -- between the parties arising out of, relating to, or
8 in connection with the agreement, including the
9 interpretation, validity, termination, or breach thereof.

10 Just as a point of reference because I think it will
11 be relevant as we move forward with this motion and the other
12 motions today, in Exhibit F, on Page 1, there's a duty to
13 negotiate; that's Section 1(b) and 1(c). There's a notice of
14 unresolved disputes, where the parties have a requirement to
15 promptly put each other on notice of any disputes between the
16 parties. And then the parties are required to employ a
17 management representative who is deputized to then go try to
18 engage in a dispute resolution process to resolve the dispute.

19 The arbitration agreement covers discovery and has
20 very limited discovery that's permitted for disputes that fall
21 under the arbitration agreement. I'm specifically referencing
22 II(C) on Page 2 of Exhibit F, where it talks about deposition-
23 less discovery:

24 "Except as expressly provided herein, the
25 arbitration shall be conducted in accordance with the

1 procedures that are mutually acceptable to the parties,
2 including limited deposition-less discovery."

3 So no depositions.

4 And then, in Section II(I) -- and that's Page 4 of
5 Exhibit F -- it specifically references discovery, stating
6 that, commencing 30 days after receipt of the submission, each
7 party may serve upon the other ten requests for production,
8 including subparts. And then it generally recites the Federal
9 Rules regarding relevance, that the request shall be made in
10 good faith and not served for delay or harassment, each
11 request shall describe the type of documents sought, and each
12 request shall be limited to documents that are relevant to a
13 claim or defense in the arbitration or leads to or is likely
14 to lead to discovery of admissible evidence. And so the
15 agreement between the parties covers arbitration -- I mean
16 covers discovery and it's very broad in its scope with regard
17 to the disputes that it relates to and that its applicable to.

18 So, with regarding to framing the dispute, on May
19 14th of 2001, turning the Court's record 1820-7, BP received a
20 notice of removal of operator for cause from Fieldwood,
21 generally stating the reasons they believed that they were
22 permitted or allowed to remove BP as operator of the loop
23 system without the necessity of a vote. This triggered the
24 dispute between the parties relating to the operatorship of
25 the loop system, the reported removal of BP as operator of the

1 loop, and the ability to remove BP as operator of the loop
2 without the necessity of a vote. So that's found at 1820-7 of
3 the Court's record.

4 On May 19th -- Document, for the Court's record,
5 1820-8 -- BP responded to Fieldwood's letter. BP generally
6 set out there, in 1820-8, its position statement with regard
7 to its purported removal as operator and the action that
8 Fieldwood was taking.

9 But most importantly, at least in terms of
10 background, Your Honor, on Page 4 of 4 there, in 1820-8, BP
11 put Fieldwood on notice of a dispute, saying that this shall
12 serve as notice of a dispute pursuant to Exhibit F of the
13 dispute resolution procedures attached to the LSPS operating
14 agreements that we already talked about. BP goes on to say:

15 "Please advise us of who your management
16 representative is going to be for purposes of seeking to
17 resolve the dispute."

18 And BP identifies Richard Eaton as the person BP is
19 putting forward to comply with the parties' agreement and to
20 comply with the dispute resolution procedures found in the
21 applicable contracts.

22 Then, Your Honor, on May 21st -- 1820-9 -- we
23 received word back from Fieldwood's counsel, stating their
24 position as it relates to the applicability of Exhibit F and
25 the dispute resolution procedures imparted in the agreement.

1 They inform us there, in Paragraph 3, that arbitration is not
2 required. However, they're willing to put forward Mr. Dane,
3 the Vice President and Chief Financial Officer, to discuss the
4 next steps. But to be clear, however -- the last sentence of
5 the fourth paragraph:

6 "Any such meeting would not necessarily" -- "any
7 such meeting would occur outside of the dispute resolution
8 procedures of the parties' agreement."

9 So, early on, they're refusing to comply with the
10 parties' agreement and Exhibit F of that agreement.

11 Then, on May 21st, Exhibit 1820-10, is my letter
12 back to Fieldwood's counsel, saying:

13 "Just want to make sure we understand your position.
14 Are you refusing to comply with the dispute resolution
15 provisions in the LSPS? Please tell us" --

16 Citing -- quoting now from Paragraph 2:

17 "Please confirm to us that our interpretation is
18 correct, that you're refusing to comply."

19 And then they write back to us, Your Honor, a few
20 days later on May 24th, which is Exhibit 1820-11, again, a
21 letter from Fieldwood's counsel stating that they disagree
22 with our positions, naturally. But in the title paragraph
23 there, they say, but under -- they reiterate that Mr. Dane is
24 going to be available to speak to us, but not under the
25 dispute resolution procedures that they believe BP is trying

1 to improperly invoke.

2 So we clearly have a dispute regarding operatorship
3 of the loop. We probably have a dispute as to whether or not
4 we have a dispute and whether or not we even have to go
5 through the dispute resolution procedures. But in any event,
6 we file our motion on 5/28, since we're unable to agree to it
7 and resolve it between the parties. And so here we are, Your
8 Honor.

9 The standard, as it relates to a -- to a motion to
10 compel arbitration like this one, Your Honor, that standard
11 was articulated clearly by this Court last year in the In Re
12 EXCO Services case that we cite in our motion and also in our
13 reply. The Court articulated and echoed that there was a
14 clear policy favoring enforcement of contractual arbitration
15 provisions, stated that generally arbitration is mandatory
16 when a dispute falls within the scope of the arbitration
17 agreement, and that so much so that the (indiscernible) of the
18 Bankruptcy Court may decline to enforce the arbitration
19 agreement and must determine whether the proceeding derives
20 exclusively from the Bankruptcy Code; and, if so, moves to the
21 second prong of the analysis as to whether or not arbitration
22 conflicts with the purpose of the Code. And I think -- and
23 that's generally referred to, as the Court recognized in EXCO,
24 as the "National Gypsum standard."

25 This dispute, Your Honor, concerns operatorship and

1 their intent to remove us as operator of the loop system.
2 It's a simple contract dispute, and the contract states that
3 maritime law applies. It does not derive exclusively from the
4 Bankruptcy Code. And for that reason, Your Honor, I don't
5 believe you get past the first element of the National Gypsum
6 standard. But even if the Court looks at the second standard,
7 compelling arbitration here surely doesn't conflict with any
8 purpose of the Bankruptcy Code.

20 First, they say we failed to show cause under the In
21 Re Sonnax case, which is the Second Circuit case outlining the
22 12 factors regarding relief from stay that they maintain apply
23 to any relief seeking lifting of the stay.

24 And simply stated, Your Honor, Sonnax does not apply
25 to our request for arbitration. Fieldwood does not cite a

1 case applying Sonnax to arbitration. This Court's EXCO case
2 that I previously discussed and that we cite in our brief --
3 not in our brief -- in our motion and our reply clearly adopts
4 the appropriate standard as the standard that we articulated,
5 and it's the standard that we satisfy.

6 And if there's any doubts, Your Honor, in the reply
7 that we filed this morning in Paragraph 4 and Paragraph 11, we
8 cite numerous cases for the position that Sonnax doesn't apply
9 in this circumstance, and even Second Circuit cases saying
10 that Sonnax doesn't apply when you are compelling arbitration
11 issues that are before the Court today.

12 Second, Fieldwood alleges that BP is trying to
13 collaterally attack the Court's February 3rd order, and Your
14 Honor, Fieldwood is just plain wrong. This isn't true.
15 Fieldwood sought an emergency order to bring the Genovesa well
16 online by April 5th, and that was accomplished. The Court
17 granted the request, the emergency relief to bring that well
18 online, BP complied with those orders.

19 THE COURT: So --

20 MR. DUEWALL: And Your Honor --

21 THE COURT: -- Mr. Duewall --

22 MR. DUEWALL: -- both parties --

23 THE COURT: -- let me talk to you about this because
24 I got to tell you that, walking out today, one of my big
25 concerns is what do I do about the orders I made, and I want

1 to make a distinction of two parts of that order:

2 One is, in issuing the order, we made findings of
3 fact and conclusions of law. I don't believe that order got
4 appealed. And in fact, I think you've told me -- and I
5 haven't seen a dispute about this -- that you guys complied in
6 good faith with the order. I don't see how, given that that
7 occurred without arbitration -- maybe it should have, maybe it
8 shouldn't have, but it occurred -- how I can now say that an
9 arbitrator is authorized to not give -- for lack of a better
10 description -- full recognition to the findings of fact or how
11 you all could challenge it, or the conclusions of law we
12 reached.

13 Conversely, you are arguing that -- or there's an
14 argument about whether our order, in fact, precludes this
15 additional relief that Fieldwood is not seeking; and, by not
16 having sought it earlier, I think you're arguing our order
17 might very well preclude them now seeking to remove you
18 because they brought a complaint, they got the relief, and
19 it's over.

20 As to the first issue, I got to tell you I have a
21 hard time thinking that you can challenge those things. As to
22 the second, I would like to hear a little bit more depth on
23 that question because at least I start the hearing by thinking
24 that, because this occurred after we issued the order -- and
25 that is their demand that you are gone as the operator -- that

1 you, in fact, could have arbitration to determine whether our
2 order precludes them from doing that on a *res judicata* effect.

3 I'm not sure that you don't want me reaching that
4 decision, but I think you get the decision is who makes that
5 decision. But I'd make a distinction between those two
6 issues. And I would like you for you to explain -- I think
7 your position in the letters is you get to challenge
8 everything we do, although you're also saying you get to
9 enforce what we did.

10 I'm not sure you get to challenge what we did by
11 saying that, in fact, you weren't in -- and I don't want --
12 whatever words I used about the breach, it seems to me can't
13 be revisited or set aside by the arbitrator. Whether there is
14 a preclusive effect of the order, maybe that is arbitrable.
15 And if you can just spend a little bit of time talking to me
16 about that because it's a -- frankly, a fascinating cases. I
17 don't think -- I don't think any of the cases you cite or they
18 cite deal with one where we've already issued an order for at
19 least part of this.

20 MR. DUEWALL: Thank you, Your Honor. And I -- what
21 I'd like to do is address both of those points. And if I
22 don't answer your question, just let me know and redirect me -
23 -

24 THE COURT: I got it, mister --

25 MR. DUEWALL: -- because I'm not trying to be --

1 THE COURT: You've --

2 MR. DUEWALL: -- evasive.

3 THE COURT: You've never been evasive about anything
4 before me, so go right ahead.

5 MR. DUEWALL: First, Your Honor, BP is not
6 questioning your order. BP is not challenging your right to
7 enforce your order. BP is not second-guessing any of the
8 findings of fact or conclusions that you made in your order.
9 That's not --

10 THE COURT: So --

11 MR. DUEWALL: -- I don't think --

12 THE COURT: So when you go to the arbitration, is
13 the arbitrator bound by those because all of the parties are
14 bound by those findings, or not bound by those?

15 MR. DUEWALL: The parties -- yes. I mean, we had an
16 opportunity to appeal that order, Your Honor, and BP didn't
17 appeal that order, that much is clear. There is no dispute
18 going forward as to whether or not you found that we were in
19 breach of contract or any of the other findings that you made
20 in February.

21 THE COURT: Right.

22 MR. DUEWALL: That --

23 THE COURT: So my question --

24 MR. DUEWALL: That --

25 THE COURT: -- is at least one degree removed from

1 that, which is: Could the arbitrator say, look, the
2 Bankruptcy Court found that there was a breach, the Bankruptcy
3 Court -- I recognize that's what the Bankruptcy Court found,
4 but my review of the evidence shows that the Bankruptcy Court
5 was wrong and I'm going to find there wasn't a breach, and
6 therefore, there can't be a removal; or is the arbitrator
7 limited to determining was that breach adequate to enable the
8 removal or does our order preclude the removal. But that's
9 different than saying the arbitrator can revisit whether there
10 was a breach. Now I want to really get down to the finest
11 point we can on that because it -- of course, I can condition
12 any relief from the stay, and so that's part of what I'm
13 worried about.

14 The issue is whether or not the breach that the
15 Court found was a continuing breach under the agreement that
16 allows removal as operator --

17 THE COURT: Right. So the --

18 MR. DUEWALL: -- or allows --

19 THE COURT: So the arbitrator --

20 MR. DUEWALL: -- the (indiscernible).

21 THE COURT: -- could determine that there -- he
22 can't redetermine whether there was a breach; he can determine
23 whether it's a continuing breach, or she could. I don't have
24 any issue with that. But are you in agreement that the
25 arbitrator doesn't get to revisit whether the breaches that we

1 found, whatever words we used about those, in fact, occurred,
2 not just agree that we found them, but -- they have to agree
3 that they actually occurred. We can't revisit it at this
4 point, I don't think.

5 MR. DUEWALL: I think that's correct, Your Honor, I
6 think that's exactly correct. I mean, we --

7 THE COURT: Okay.

8 MR. DUEWALL: Taking a step back, you know, we had
9 an opportunity to appeal that order --

10 THE COURT: Right. No, no, I think we're on the
11 same page.

12 And then -- so we then get down to a defense you're
13 making -- and I mean, obviously, I'm talking to Mr. Genender
14 at the same time I'm talking to you -- which is, look, the
15 Bankruptcy Court's order was a final order on this dispute and
16 it precludes additional relief. And I think you want the
17 arbitrator to decide that and not me. It's a little bit weird
18 because I don't think that the fact that it is arbitrable
19 necessarily means that I lose the jurisdiction to enforce my
20 own orders. But in this case, of course, it would be an
21 enforcement in your favor if that's what happened. But I
22 guess I could rule against that, and at which point that might
23 preclude an arbitrator.

24 So what do you think about figuring out whether my -
25 - who has the authority to figure out whether my order

1 precludes this action under *res judicata* theories that they
2 came in, they got relief, if they didn't get what they wanted,
3 that's tough, they don't get to come back? That's, I think,
4 your -- I'm putting words in your mouth and I think that's
5 what you're saying.

6 MR. DUEWALL: I think that's going to be -- well, I
7 don't think anyone is precluded from making that argument at
8 the arbitration, and I don't think making that arbitration --
9 that argument at the arbitration offends the findings of facts
10 that you made in your order. I think the arb -- the issue for
11 arbitration, in my mind, is the removal as operator or who is
12 going to be the operator or the election of the operator or
13 how this asset is going to be operated on a going-forward
14 basis. It's kind of all tied up into the idea of operatorship
15 and the right to remove us --

16 THE COURT: So you --

17 MR. DUEWALL: -- as operator --

18 THE COURT: So you -- and I'm not sure I disagree
19 with this at all. I just want to talk -- I'm -- it's a
20 confusing question for me. I think what you're telling me --
21 and I think you're right, but I want to hear argument to the
22 contrary -- that the arbitrator, because the removal issue
23 arose after we issued our order, would be authorized to
24 determine whether our order precludes the removal is what
25 you're telling me, I think.

1 MR. DUEWALL: That's correct, because the order, by
2 its own clear language, shows that nothing therein shall
3 create or is intended to create any rights in favor of or
4 enhance the status of any claim held by any party.

5 You know, taking it a step further from what the
6 Court just said, if they had wanted to remove us as operator
7 back in February, they had the opportunity to try to do that.
8 They didn't. The parties' agreement, in Section 3.02(a),
9 which is the removal provision, or a definition of a "default"
10 under 1.01, both those provisions talk about -- the removal
11 talks about the continuation of any of the following
12 circumstances. Default talks about a material breach or
13 nonperformance that occurs for more than 30 days.

14 So there's an idea within the parties' agreement
15 that, if there's a breach or if there's a default, whether
16 it's been found by the Court or alleged by one of the parties,
17 that a court has to -- not the Court -- the party has to
18 assert their rights in a timely manner before that default is
19 cured. I think that's going to be the scope or one of the --
20 that's going to be one of the questions of the arbitration,
21 and that's outside of the scope of the Court's previous order,
22 is whether or not I wait 100 days, you know, over 3 months
23 after the alleged breach was cured, the parties worked
24 together, worked hard together to bring the Genovesa well
25 online.

1 And let's be clear, Fieldwood worked hard and so did
2 BP. The Court's order was a call to action, it was heard loud
3 and clear. The Genovesa well was brought online before the
4 April deadline to do so, through hard work of both parties.
5 They recite that fact in their disclosure statement, and I
6 don't think it's disputed that the parties worked
7 cooperatively to bring the well online by March 20 -- March
8 27th. That's Page 49 of their disclosure statement, in our
9 record at 1820-12.

10 And so I don't -- but at the same time, when they
11 went to the Court before, the issue was very narrow as to
12 whether or not they were entitled to emergency relief to
13 preserve what they believed and what the Court determined was
14 a valuable asset of the estate, whether extraordinary relief
15 was required to preserve that asset. The Court found that it
16 was, made certain findings with regard to --

17 THE COURT: Right.

18 MR. DUEWALL: -- to that issue.

19 And now, 100 days later, they want -- and this, I
20 think, is the subject of the arbitration -- they want to pull
21 a gotcha out of their back pocket and say you're removed,
22 you're removed without a vote, you're removed as a matter of
23 the findings that were made, without any allegation of a
24 continuing default under the parties' agreement.

25 And I think we can have both here. We can have the

1 Court's order, which they believe -- and I suspect, in
2 arbitration, they're going to file a dispositive motion early
3 on in the process and say, as a matter of law, we win because
4 the arb -- because these findings have been made. And our
5 response is going to be the -- what I've articulated to the
6 Court already. And those two things can coexist, based upon
7 the Court's own finding that, by bringing this well online and
8 granting this extraordinary relief, they weren't being given
9 any other rights or their status wasn't being enhanced at the
10 same time.

11 THE COURT: So, Mr. Duewall --

12 MR. DUEWALL: But I am --

13 THE COURT: -- you wanted to make sure you answered
14 my question. You have thoroughly answered my question and I
15 will let you return to your presentation --

16 MR. DUEWALL: Okay.

17 THE COURT: -- and I appreciate the forthrightness -

18 -

19 MR. DUEWALL: Okay.

20 THE COURT: -- of the answer.

21 MR. DUEWALL: Thank you, Your Honor. And so that, I
22 think, covers the collateral attack issue.

23 And the last issue, Your Honor, that they assert is
24 a waiver. They allege that we've waived the right to invoke
25 arbitration. And again, Your Honor, I think the argument

1 fails because it doesn't satisfy the standard that they set
2 out in their own papers.

3 Number one, BP hasn't substantially invoked the
4 judicial process. BP has never, I don't believe, invoked the
5 judicial process. By showing up to the hearing on the
6 emergency relief issue, we haven't waived or invoked the
7 judicial process or these other issues that should be subject
8 to arbitration.

9 And number two, there's been no prejudice based upon
10 invocation of the judicial process. And that's the standard
11 for prejudice that the Court -- this Court set out, again, in
12 the EXCO case, that -- whether or not there's an inherent
13 unfairness caused by one party's reliance on the judicial
14 process.

15 And finally, Your Honor, that's their burden to
16 prove, and I don't think they've proved it in the papers that
17 they've set out before the Court or with any evidence of undue
18 burden or prejudice based upon having to take this issue, the
19 discrete issue of removal of operatorship, to arbitration.

20 Now -- and so, Your Honor, based upon the fact that
21 we have a clear dispute/disagreement that falls within the
22 parties' arbitration agreement, we respectfully request that
23 the Court lift the stay and refer the dispute regarding the
24 operatorship of the loop system to arbitration, so the parties
25 can move forward under the terms and conditions of Exhibit F

1 of the loop system agreement.

2 THE COURT: Very well. Thank you.

3 Mr. Genender.

4 MR. GENENDER: Thank you, Your Honor. Paul Genender
5 for the Debtors. Can I ask you to make Kevin Simmons the
6 presenter, please?

7 THE COURT: Yes, sir.

8 (Pause)

9 THE COURT: I got him.

10 MR. GENENDER: Thank you, Judge.

11 THE COURT: All right.

12 MR. GENENDER: Great.

13 Your Honor, we have a few -- a short few slides I
14 want to walk through in connection with the arbitration
15 motion. And your discussion with Mr. Duewall, I think, was
16 helpful, in terms of -- you addressed several of the points we
17 wanted to make, so thank for that. But to start, we can just,
18 you know, hit this just to level-set.

19 I feel as though Mr. Duewall, his argument reminded
20 me of the Faulkner books I used to read when I was in college
21 because it kind of started in the middle of the plot with the
22 May 14th termination. And I think it really needed to start
23 with the hearing before Your Honor on February 2nd, which led
24 to the order you entered on February 3rd.

25 So, as we all -- as everyone agrees, you found that

1 they wilfully -- that BP wilfully failed to comply with the
2 contract and they did it for their own economic benefit.
3 That's at ECF 854, the transcript at Page 229.

4 Looking at the operating agreement at ECF 1821-4 --
5 and this addresses a point, without your order, Your Honor,
6 there could be no right to remove BP as operator because, in
7 effect, they could be removed based on having been found
8 liable by a final judgment of a court of competent
9 jurisdiction or an arbitration panel for an act of gross
10 negligence or wilful misconduct hereunder.

11 THE COURT: So what --

12 MR. GENENDER: I think the --

13 THE COURT: -- do I --

14 MR. GENENDER: -- record is --

15 THE COURT: What do I do about the reservation
16 contained within the order that says that it's not going to --
17 we can look at the words -- you know, "create" or "enhance"
18 any rights that you might have? And now you're telling me it
19 directly does that.

20 MR. GENENDER: Yes, let's turn to that because it
21 does say that -- I want to put that language up. Thank you.
22 Okay. Let me get --

23 THE COURT: Paragraph 6, it's up.

24 "Notwithstanding the entry of this final order, nothing
25 herein shall create, nor is intended to create any rights

1 in favor of enhance the status of any claim by" -- "held
2 by any party."

3 Doesn't someone, whether it is me or an arbitrator,
4 have to decide whether Paragraph 6 precludes you from doing
5 exactly what you were doing, which is relying solely on the
6 order to remove them and not on something else?

7 MR. GENENDER: Well, I think -- I read Paragraph 6,
8 Your Honor, to relate to a claim of any party; and, at that
9 time, the claim that we're talking about here did not exist.
10 And then I --

11 THE COURT: Well, it says --

12 MR. GENENDER: -- would read it --

13 THE COURT: It says --

14 MR. GENENDER: -- in conjunction --

15 THE COURT: -- "any rights in favor or enhance the
16 status of any claim held by any party" -- or "by any party" --
17 yeah, "held by any party."

18 MR. GENENDER: I --

19 THE COURT: Somebody needs to --

20 MR. GENENDER: I --

21 THE COURT: -- figure out what that means, right?

22 So who decides --

23 MR. GENENDER: Sure.

24 THE COURT: Who decides -- and this is part of what
25 I was asking Mr. Duewall before. Does -- isn't -- would the

1 arbitrator have the ability to look at Paragraph 6 and say you
2 are using the order as a whole to remove them, and it isn't
3 the underlying facts about anything, it's merely the existence
4 of the order, and that's precluded by Paragraph 6; or the
5 arbitrator could say, no, no, no, this deals with whether
6 there is some claim out there, some economic claim, the
7 argument that maybe you're making. Who decides that, me or
8 the arbitrator or either one of us?

9 MR. GENENDER: Your Honor, we submit you do. And
10 two things:

11 To get to your point on Number 6, that is not a new
12 -- it's not a new claim. Fieldwood had a contractual right
13 that arose by virtue of your order. But I also would point
14 the Court to Paragraph 10, where it says this Court -- of that
15 same order:

16 "This Court shall retain jurisdiction to hear and
17 determine all matters arising from or related to the
18 implementation, interpretation, and/or enforcement of
19 this order."

20 I think that actually answers your last question,
21 Your Honor, about who would make that decision. I think the
22 answer, from the face of your order, is you.

23 And obviously, the issue of waiver of arbitration
24 speaks to this because it is our view, Your Honor, that there
25 is not a new dispute that arose by virtue of the removal of BP

1 as operator, is a continuation of this; and, therefore,
2 frankly, we don't believe there is a pending issue. They are
3 removed, they have been removed.

4 And I agree with Mr. Duewall that there is a -- when
5 he said, in his straightforward and candid manner -- and I,
6 for the record, mean that as a compliment -- that there is a
7 dispute as to whether there is a dispute. I agree with that.
8 We don't think there's a dispute.

9 THE COURT: So you think --

10 MR. GENENDER: We have, because of --

11 THE COURT: You think --

12 MR. GENENDER: -- 3.02.

13 THE COURT: You think they're not the operator; they
14 think they are the operator. Why isn't that a dispute? I
15 mean, I --

16 MR. GENENDER: Well --

17 THE COURT: What are we going to do?

18 MR. GENENDER: -- I --

19 THE COURT: Are we going to send out two armies --

20 MR. GENENDER: No --

21 THE COURT: -- and resolve this? I mean, it's --
22 somehow, there is a dispute.

23 MR. GENENDER: I don't think we should send out two
24 armies, I'm going to -- I'm going to answer that one first.

25 Your Honor, yes, I think that that, in and of

1 itself, is a dispute as to whether there's a dispute. I
2 think, under Paragraph 10, you have jurisdiction to address
3 that issue. I also think you have jurisdiction to address the
4 arbitrability of any such dispute. And we would submit that
5 they have waived that right to arbitrate because it is -- this
6 relates back to what was considered before Your Honor, and
7 they consented to that.

8 THE COURT: So, look --

9 MR. GENENDER: And actually, Your Honor --

10 THE COURT: Can I just --

11 MR. GENENDER: -- if removal is --

12 THE COURT: I want to push back on that a little
13 bit. Under just the standard --

14 MR. GENENDER: Sure.

15 THE COURT: -- waiver definition, I didn't know that
16 I was determining whether they were removed as an operator.
17 So was there a knowing and wilful abandonment of a right by
18 them -- and I may have those words slightly wrong, but you
19 know what cases I'm referring to -- when I didn't know --

20 MR. GENENDER: Yeah, I do.

21 THE COURT: -- we were litigating it? Are we -- are
22 they supposed to figure it out when I didn't?

23 MR. GENENDER: Yes, because they're bound to know
24 what's in their contract, even if they -- even -- and I submit
25 the Court was understanding -- it was understandable that the

1 Court wouldn't know they were giving up their right to
2 arbitrate because they never raised the issue of arbitration
3 throughout that very intense period of time when we were
4 before you, Your Honor, he record will reflect it, but several
5 days in the course of the week.

6 And if we can move ahead to Slide 12, please, Mr.
7 Simmons. Your Honor, I want to -- if I could move into -- if
8 I could move into this -- next slide, please. Yes.

9 So they never -- BP -- I want to address what you
10 were -- because I think it goes to your point, Your Honor.
11 They never invoked arbitration at any hearing. They did
12 invoke the Court's jurisdiction. They didn't, obviously,
13 appeal the Court's finding or order. And as we have here,
14 Your Honor, this is ECF 816, the transcript at Page 8, Lines
15 10 through 11, an excerpt from January 28th, before the
16 hearing. Ms. Heyen says:

17 "The second prong would be that Fieldwood must take the
18 initiative to request and use good faith efforts to
19 obtain a suspension of production or SOP. Fieldwood's
20 statement that it doesn't think that it can be an SOP
21 shouldn't count by the Court. We think Fieldwood should
22 be compelled to start that process."

23 Now that is BP seeking relief from the Court.

24 February 1st, this is the day before the hearing,
25 Your Honor, where you may recall that you submitted, and then

1 I think filed a draft order for the parties to consider. We -
2 - it was acceptable to Fieldwood; it was not acceptable to BP;
3 and, therefore, we had the hearing on February 2nd. But that
4 February 1st status at ECF 827, this is the recording.

5 Ms. Heyen says:

6 "It might be helpful for the parties to see if they can
7 resolve this through a quick mediation for a Federal
8 Judge. And if we can't get that done tomorrow, then, you
9 know, we can proceed with the evidentiary hearing."

10 Seek -- requesting mediation is a form of seeking
11 relief.

12 Going to the next page, February 2nd, at the actual
13 evidentiary hearing, at the threshold, Your Honor, this is ECF
14 854, Page 5 of the transcript. You said:

15 "All right. Ms. Heyen, is that correct? Is that the way
16 you think we ought to move ahead?"

17 Ms. Heyen says:

18 "Yes, Your Honor. And we sincerely appreciate the
19 Court's diligence and efforts regarding the draft order.
20 But in that limited time between last night and this
21 morning, we were unable to reach an agreement. So, Your
22 Honor, we are ready to proceed with a hearing."

23 Thereafter, same hearing, Mr. Stark, a colleague of
24 Mr. Duewall and Ms. Heyen, states -- two different portions.
25 We're still within ECF 854, on Page 94. And he moves for a

1 directed verdict, a form -- I submit a form of relief. Page
2 229 -- and this is in closing, Your Honor.

3 THE COURT: I have to say --

4 MR. GENENDER: This is --

5 THE COURT: -- just so you -- just so you know,
6 you're never going to convince me that a directed verdict --

7 MR. GENENDER: I --

8 THE COURT: -- you lose is seeking a form of relief.

9 So --

10 MR. GENENDER: I --

11 THE COURT: -- you should --

12 MR. GENENDER: I -- Judge, there's a reason that's
13 the shortest excerpt. And if I were going to rank arguments
14 on strength, that should be at the end. I'm not going to --
15 I'm not going to hang my hat on that, Your Honor, I understand
16 that. It might be indicative, but I don't think it's
17 dispositive to be -- in all candor. Okay?

18 I do think, however, getting to the last excerpt I
19 want to point the Court to, where he asks would the Court --
20 would the Court require -- asked the Court -- Your Honor to
21 require Fieldwood to post a substantial bond -- that is a form
22 of relief -- in the event you ruled in Fieldwood's favor. And
23 he then says:

24 "But I would also ask Your Honor to compel Fieldwood to
25 immediately submit an SOP application."

1 Again, another form of relief. They're asking you
2 to make -- to do -- not just say -- they're not just a passive
3 bystander here.

4 And also, Your Honor, just to take a step back.
5 What were we talking about? The relief that clearly -- first
6 of all, it goes without saying that, in none of those
7 instances, did BP invoke arbitration. Did they say, you know
8 what, Your Honor, you don't have jurisdiction, we have this
9 clause under the operating agreement, Exhibit F, there's a
10 very detailed, four-to-six-page arbitration agreement, we
11 shouldn't -- you shouldn't be deciding it, you don't have
12 jurisdiction? But they didn't do that. They clearly waived
13 that as it relates to what happened in late January, early
14 February, leading up to your order on February 3rd.

15 THE COURT: So I have to -- let me just say this.
16 And again, I'm talking to Mr. Duewall at the same time I'm
17 talking to you. I think this is a significant question for me
18 as to whether, by proceeding in the hearing, there was a
19 waiver. I don't know a pretty fine area of the law that I
20 would like you all to explain to me, and maybe even a little
21 bit of post-hearing briefing on the waiver question.

22 Backing up, they didn't seek affirmative relief,
23 Mr. Genender. Seeking to limit what you're getting and to
24 limit damages to them from what you're getting is not seeking
25 affirmative relief. It's participating in a hearing therein.

1 So what I'm worried about is --

2 MR. GENENDER: Sure.

3 THE COURT: What I'm worried about is waiver.

4 But you come to court and you look at the Fifth
5 Circuit case law and you're aware of the exigent
6 circumstances. And you say, look, we're not going to win an
7 arbitration motion on an emergency basis on January 28th, so
8 we're not going to do it. And then somebody removes you as
9 operator and you say this is a horse of a different color,
10 it's squarely within what we want to do, now we want to revoke
11 it.

12 I am not convinced that, when the remedies are that
13 far different, and when you have to deal in an area of -- and
14 I'm not being critical of the Fifth Circuit in this at all --
15 but ambiguous law as to what to do in those situations, that,
16 if BP says, as to the first hearing, it just -- we're going to
17 end up losing an arbitration motion, we're going to look bad,
18 this is an emergency, if what they say is right, you know, we
19 got to go ahead with that hearing, and later say, okay, now
20 this has gotten to this stage where we're no longer in that
21 ambiguous area, we're now in a clear area of arbitration,
22 maybe that is a waiver.

23 Maybe making that strategic decision, assuming they
24 made it -- and I -- it's also possible, and I'm not going to
25 ask them -- maybe they didn't know about the arbitration

1 provision, I don't know. But if they made a strategic
2 decision or didn't know about it, and then the nature of the
3 relief that your client is demanding, not in court, but
4 demanding in communications materially changes, does the
5 waiver -- is the waiver permanent in there?

6 And I don't know that answer, but I want to hear you
7 all talk about it or tell me you want to chance to look and
8 see if there's any case law about that because it is a -- it
9 may be the same facts and circumstances, there may be a
10 preclusion question -- and I have that. But if there isn't a
11 preclusion question, which would only go in their favor, then
12 is there a waiver question which could only go in your favor?

13 MR. GENENDER: So, Your Honor, I think it may make
14 sense to consider it further after the hearing. But I also
15 would offer the following in response to your question, and I
16 would say this. And I have certainly done a lot of injunction
17 work in State and Federal Court over the course of my law
18 career, and I get how that interplays with arbitration. And
19 oftentimes, as the Court knows, there's -- the dispute
20 provisions say you have to arbitrate, unless it's a matter of
21 equity, where you've got to run to the courthouse. Okay?
22 This provision doesn't say that, to my reading.

23 But let -- I want to work off your hypothesis.
24 Okay? Which is did -- and getting back to basic, you know,
25 black-letter law: What is "waiver"? Waiver is a

1 relinquishment of a known right. Okay? We don't have to know
2 whether BP was aware of what's in its contract or not because
3 it's charged -- I submit it's charged with knowing what's in
4 its contract. And when we litigated issues under that
5 contract, it's charged with knowing it and knowing that
6 there's a six-page arbitration provision.

7 Now we're in here. And of course, Your Honor, we
8 were telling you it was an emergency. They were telling you
9 it was not an emergency. That's important, Judge. They were
10 actually -- the record is replete with BP saying there's not
11 an emergency here. And we were saying it was and you agreed
12 with us. Okay? And you made a finding that it was an
13 emergency.

14 So, if they are making a finding or taking a
15 position it's not an emergency, then they should have been
16 invoking the arbitration clause, if they wanted to have the
17 right to do it later with something that arose as an outgrowth
18 under the same contract, where your order, by contract, is a
19 prerequisite to being able to remove them as operator.

20 Was it foreseeable? Absolutely. Your Honor made a
21 finding that they placed their own interests ahead of the
22 contractual obligations to Fieldwood. The fact that they
23 allowed Fieldwood to get the Genovesa well online and
24 cooperated in that and didn't violate your order doesn't mean
25 that the relief that you provided was finite. The reality is

1 the damage that they did that was partially addressed by your
2 order is still ongoing.

3 And we have the right -- and it was a right we had
4 before we came to Your Honor -- this goes back to your
5 Paragraph 6 question. We had the right to remove them as
6 operator if there was a judgment that they engaged in wilful
7 misconduct. So you didn't create an additional -- we're not
8 creating an additional right beyond that. And then I would go
9 to Paragraph 10, in terms of your enforcement.

10 But Your Honor, had they said on January 28th
11 through the commencement of the hearing on February 2nd -- and
12 my memory is it started in the middle of the afternoon and it
13 went past ten o'clock that night; it was a full day and
14 evening. Had they said, Your Honor, we object to you
15 proceeding because of the arbitration clause and this, that,
16 and the other -- and presumably, Your Honor, we might have
17 opposed that because of the emergent situation. And they
18 would have said -- because they did say it's not an emergent
19 situation, Judge, there's no emergency, and they said that.
20 And you would have made a decision, one way or another. You
21 would have said I have jurisdiction, I'm going to go forward
22 because there's -- I find, as a threshold matter, it's an
23 emergency. Then they would preserve their right to arbitrate
24 today.

25 THE COURT: Well, I'm not --

1 MR. GENENDER: Then --

2 THE COURT: Are you sure that's right?

3 MR. GENENDER: I would submit they --

4 THE COURT: So, if they argued arbitration then and
5 I issued the judgment, wouldn't they have to appeal that maybe
6 to preserve the right? I don't know.

7 MR. GENENDER: Well, I certainly think they would
8 have had -- yeah, well, I think their failure to appeal is
9 also another act of waiver, absolutely. I think all that --
10 and Judge, I was talking -- whether the points are seeking
11 affirmative relief or active participation, I -- it's by --
12 active participation is enough. We can certainly brief that.
13 And they -- we can certainly brief -- I'm sorry. I didn't
14 mean to --

15 MR. GENENDER: -- cut you --

16 THE COURT: No, I didn't --

17 MR. GENENDER: -- off, Judge.

18 THE COURT: I didn't expect these issues to converge
19 like they are in my mind with hearing the argument and hearing
20 Mr. Duewall's argument. But let me throw out this
21 convergence.

22 If this was the same dispute, then you might be *res*
23 *judicata*'ed out; and, if it's a different dispute, then I
24 don't understand how there is waiver. Are you telling me that
25 waiver can carry from Dispute A over to Dispute B; i.e., that

1 the case law says, if, in one dispute, you don't invoke
2 arbitration, you have now forfeited arbitration for all future
3 disputes? I really doubt that's the law.

4 MR. GENENDER: I --

5 THE COURT: So, if it's the same dispute --

6 MR. GENENDER: Sure.

7 THE COURT: -- you didn't get removal, then maybe
8 your argument is you weren't -- there wasn't a dispute about
9 that at all and I got it; and, therefore, you don't -- didn't
10 need that in the order because that was a natural consequence.
11 But it still then becomes a dispute later when they say we're
12 not leaving.

13 MR. GENENDER: So, Your Honor, you -- to answer your
14 -- we are not saying this is a distinct dispute, they waived
15 the first one; and, therefore, because they waived arbitration
16 as to a distinct dispute, they've waived it as to this later,
17 different -- we're not saying that, right?

18 THE COURT: Okay.

19 MR. GENENDER: A hundred percent.

20 However, we are saying that it is the same dispute,
21 it's a continuation of it. It arises -- this issue of removal
22 is a foreseeable consequence of the dispute that you decided
23 and that you retain jurisdiction over and that they did waive
24 their right to seek arbitration; therefore, they don't have
25 cause to have the stay lifted.

12 MR. GENENDER: Yes. And Your Honor, you didn't rule
13 no arbitration. You weren't asked --

14 THE COURT: I wasn't.

15 MR. GENENDER: -- by --

16 THE COURT: And they're not --

17 MR. GENENDER: -- by --

18 THE COURT: And they're not contesting the
19 enforceability of what I did.

20 MR. GENENDER: Which I think cuts in favor of the
21 fact that there is waiver, in our view, on these facts through
22 their participation and through their action and inaction in
23 the dispute; inaction being failure to appeal, failure to
24 request arbitration, failure to raise the issue, failure to
25 preserve the issue. And that's their right to make those

1 decisions. But they do have consequences when it -- when we -
2 - when the removal under 3.02 of the operating agreement is a
3 natural consequence of your order.

4 By definition, we could not have requested that they
5 be removed until we had your finding that day.

6 THE COURT: I got it.

7 MR. GENENDER: And --

8 THE COURT: I don't know that that means you win. I
9 -- you're right.

10 MR. GENENDER: Well, so I -- if I could have a
11 minute just to look at my notes.

12 THE COURT: Sure.

13 MR. GENENDER: And I appreciate doing this in Q-and-
14 A format because I think it, not only made it better, it made
15 it more streamlined.

16 (Pause in proceedings)

17 MR. GENENDER: I think the -- I think the -- a
18 couple of points. The letters that went back and forth, they
19 say what they say --

20 THE COURT: Right.

21 MR. GENENDER: -- they're in evidence. I think the
22 record would reflect that we were not taken up on the offer
23 for Mr. Dane and Mr. -- I think it's Eaton, to speak. That
24 just didn't happen. We weren't trying to prevent a
25 conversation; we were preserving a right. I think the record

1 -- I just want to make that point, I think that's clear from
2 the letters.

3 (Pause in proceedings)

4 MR. GENENDER: Bear with me, Judge. I don't think I
5 have anything to add, Your Honor. Thank you very much for the
6 opportunity to talk through these with you.

7 THE COURT: Thank you.

8 Mr. Duewall.

9 MR. DUEWALL: Thank you, Your Honor.

10 I'll just cut to the chase. And I think that the
11 waiver issue is addressed, if the Court would look at 1820-3,
12 Page 1 of Exhibit F. And I'll give the Court a moment to turn
13 through.

14 THE COURT: I'm on Page 1 of Exhibit F.

15 MR. DUEWALL: Thank you, Your Honor.

1 says:

2 "Each party hereby expressly covenants that it shall not
3 resort to court remedy, except as provided for herein and
4 for preliminary relief in aid of arbitration."

5 Either party could go to the courthouse, even under
6 this agreement, and seek a TRO and seek extraordinary relief,
7 seek a mandatory injunction, which is what they did. They
8 sought a mandatory injunction to bring the well online by a
9 date certain. The issued its call to action. The parties
10 cooperated. That was accomplished. And so, by the very terms
11 of the agreement, we're not waiving our right to then
12 arbitrate separate disputes later on. In fact, I'd argue we
13 didn't waive the right to arbitrate that very same dispute.
14 But here, I think we don't even have to get there because it's
15 a different dispute over operatorship.

16 In fact, as we've been talking, my associate has
17 done a little bit of research and he was going to hand me a
18 case. We found a couple of cases citing that very point that
19 Mr. Genender was making and that I just made that state, even
20 the parties state that, quote:

21 "Any and all issues under this contract shall be resolved
22 by arbitration."

23 Courts have found that a party can seek injunctive
24 relief to prevent irreparable injury, so long as the Court is
25 not deciding (indiscernible) through arbitration. That's

1 Merrill Lynch v. Bradley, 756 F.2d 1048, 1053. It's a Fourth
2 Circuit case from '85.

3 I think, if we had a little more time, we could
4 probably cite plenty of Southern District and Fifth Circuit
5 cases making the exact same point because I think the
6 principle is largely recognized that I can go to the
7 courthouse and preserve the status quo without jeopardizing my
8 right to later arbitrate those issues, especially here, when
9 I'm not even in the party that's running to the courthouse to
10 begin with.

11 You know, BP showed up for the hearing, did its
12 best. You ruled against it, you ruled against BP. We're not
13 seeking to re-litigate those issues. If anything, it sounds
14 to me like Fieldwood is the entity that's seeking to re-
15 litigate the February hearing.

16 So, Your Honor, unless you have any other questions
17 for me, if you think we need or if you would want some
18 briefing on that discrete waiver issue that you discussed,
19 we're happy to submit a short statement in that regard to the
20 Court.

21 THE COURT: Let me ask -- let me ask Mr. Genender to
22 respond to that last sentence under I(A) (I).

23 MR. GENENDER: Yeah, thank you, Judge.

24 I read it differently. First of all, I read it to
25 each -- well, I think the first sentence is important. But

1 the second sentence:

2 "Each party expressly covenants that it shall not resort
3 to court remedies" --

4 THE COURT: Right. So you --

5 MR. GENENDER: "-- except" --

6 THE COURT: You had a covenant --

7 MR. GENENDER: -- "as provided" --

8 THE COURT: You had a covenant that you wouldn't
9 come here, right? Unless you needed preliminary relief in aid
10 of arbitration. Why shouldn't we assume that's exactly what
11 you did? You didn't --

12 MR. GENENDER: They didn't --

13 THE COURT: -- breach your --

14 MR. GENENDER: -- object --

15 THE COURT: You didn't breach your -- no, you didn't
16 breach your covenant. You came for preliminary relief in aid
17 of arbitration. How is that a waiver on their part?

18 MR. GENENDER: Well, on their part -- well, Judge,
19 first of all, it's -- they could have -- they could have taken
20 the position that we didn't come for preliminary relief in aid
21 of arbitration. They could have take -- they could and should
22 have taken the position --

23 THE COURT: What if they didn't want --

24 MR. GENENDER: -- if they --

25 THE COURT: -- to take --

1 MR. GENENDER: -- were to --

2 THE COURT: -- a position --

3 MR. GENENDER: -- preserve --

4 THE COURT: -- that you were breaching anything,
5 they just recognized that you were honoring your obligations.
6 You had a covenant to arbitrate, unless you needed preliminary
7 relief in aid of arbitration. And why couldn't they assume
8 you were doing what you had promised to do?

9 MR. GENENDER: They could, Judge, but that's -- but
10 they also run the risk of having --

11 THE COURT: You broke up. Of having -- your line
12 cut off. You said "of having," and then you went away.

13 MR. GENENDER: Okay. Sorry.

14 They run the risk of relinquish -- of doing what I
15 believe they did, which is relinquishing a known right to
16 arbitrate that dispute.

17 And Judge, Mr. Duewall talked in terms of an
18 injunction. You didn't -- I don't believe you issued a
19 mandatory injunction. You didn't -- you compelled them to
20 bring the well online and gave them the option to -- if they
21 didn't want to do it, to let us do it, and then had some other
22 conditions associated with it. Obviously, your written ruling
23 incorporates your findings on the Record, Findings and
24 Conclusions on the Record, but it wasn't an injunction.

25 You declined to issue -- to require Fieldwood to

1 post a bond. You ordered BP to live up to its contract that
2 you found it breached. So we don't take issue with anything
3 you did in connection with that.

4 THE COURT: I know that part, so.

5 MR. GENENDER: Yes, sir. Yes.

6 And I think the -- and I think the Record would
7 reflect that the result was -- most importantly, that the
8 result that -- as far -- in terms of the well coming online
9 was good for the estate. However, I think -- I believe, if my
10 memory serves, you made reference that there might be an issue
11 as to damages that wasn't before you at that point and --
12 because we were looking at an immediate -- a narrower issue.
13 But this issue, in terms of removing them as an operator, does
14 arise from what happened on the 2nd and 3rd -- or 2nd,
15 February 2nd.

16 THE COURT: Okay.

17 MR. GENENDER: I hope --

18 THE COURT: Let me --

19 MR. GENENDER: -- I answered your question.

20 THE COURT: So let me tell you all what I would like
21 to do, and then I want to see if anybody has any real problem
22 with this. I am very worried about the waiver issue. I am
23 very focused, and hadn't been until he brought it up, on the
24 last sentence of I(A)(I), and I want to get briefing on that,
25 so that I don't blow the waiver issue. So I would like

1 briefing to come in within a week, so next Friday.

2 Second thing, we have a time deadline for when BP
3 may have to be departing. I want to freeze and extend time,
4 so that I can make a decision. So I want to issue an order, a
5 preliminary order, that says that whatever the time deadlines
6 are, are extended for a period running July 9th until I issue
7 an order determining whether to compel arbitration, so that if
8 -- and I haven't calculated the date. If August 1 is the
9 magic date, and if it takes me two weeks to make a decision,
10 that's going to then be August 15th, if Fieldwood prevails.
11 And obviously, if they prevail, then you're going to have an
12 arbitration over what that date is.

13 Third, I want to compel, under my preliminary
14 authority, if nothing else, a meeting between Mr. Dane and Mr.
15 Eaton, so that the parties are meeting, not under the
16 arbitration provision -- which I got why you wouldn't want to
17 do that, Mr. Genender, I don't have a problem that you're
18 trying to protect those rights. But I want them to at least
19 meet. And so, if they're doing it under my order, perhaps
20 this can result in a commercial resolution to the problem,
21 where I think I just have the authority to make people do
22 that, without anybody having to worry about whether they're
23 waiving rights to comply with the order.

24 And I want to send a message with that, if it hasn't
25 been very clear from this. Mr. Dane, if I were to rule right

1 now because people don't like this and I have to rule right
2 now, you're going to lose and I'm going to send it to
3 arbitration. I'm not sure that's the right ruling, which is
4 why I want to take this time.

5 But Mr. Duewall, I think, if it goes to arbitration,
6 you guys may lose in the arbitration. I think your client has
7 a big risk here that what I did, even though I -- I mean, and
8 I think you know I didn't know the consequence of the
9 operatorship removal. You all have big risks because the
10 arbitrator, who I think has to recognize my Order, will just
11 say it's game, set, and match.

12 So I'm not sure that losing -- that winning today
13 doesn't put your client still in a bad position, but that will
14 be up to an arbitrator. I express no view on whether that's
15 the correct decision by an arbitrator or not, none. I don't
16 know if that's the correct decision. I just know that,
17 looking at this stuff, there's something here for everybody to
18 be worried about. So I want parties to meet in the context of
19 those concerns.

20 Now you all can argue against what I think I'm going
21 to do, and I think you can sort of make me make a ruling
22 today, if you were to demand it. I would much prefer that I
23 get to the right position, so that, on appeal, it's going to
24 be a lot more defensible.

25 Let me hear from Mr. Duewall and Mr. Genender,

1 whether you all have any objection to that kind of a
2 preliminary freezing order and meet-and-confer by the
3 principals for a commercial resolution.

4 MR. DUEWALL: I don't have any objection, Your
5 Honor. We can submit that followup brief by next Friday.
6 Does the Court have any preference as to how long? Three or
7 four pages probably at the max, I'm assuming.

8 THE COURT: I --

9 MR. DUEWALL: We can --

10 THE COURT: Look, this is a big, important issue, so
11 take ten. How is that?

12 THE COURT: Mr. Genender?

13 MR. DUEWALL: Thank you, Your Honor. We have no
14 objection to freezing -- the freezing the status quo.

15 And with regard to a meet-and-confer between Mr.
16 Dane and Mr. Eaton, does the Court have a preference on how
17 quickly the Court would like to see it occur?

18 THE COURT: Well, I want it to occur before I issue
19 a ruling, so that you all can try and reach a commercial
20 resolution. And I don't know what their schedules are. I
21 have no concern, especially over what happened from my last
22 order, that everyone, in good faith, will try and have such a
23 meeting. So, you know, they're busy people, you all work out
24 a time for it, and file something with me that tells me that
25 the meeting has concluded without a resolution or with a

1 resolution. I won't issue a ruling until I get that kind of a
2 statement. Does that work?

3 MR. DUEWALL: Thank you, Your Honor, it does.

4 THE COURT: Mr. Genender, are you okay with that?

5 MR. GENENDER: Yes, I am.

6 Your Honor, can I make -- can I correct something I
7 said earlier or maybe complete something I said earlier, as
8 consistent --

9 THE COURT: Sure.

10 MR. GENENDER: -- with what I hope -- well,
11 consistent with what I hope the Court thinks is my continuing
12 duty of -- my continuing actions of candor to the Court.

13 The things that I said, where BP didn't invoke
14 arbitration at the hearings, is true. I do want to, however,
15 note that there was a reference to arbitration in one of BP's
16 pleadings --

17 THE COURT: That's in --

18 MR. GENENDER: -- leading --

19 THE COURT: That's actually in --

20 MR. GENENDER: -- up to --

21 THE COURT: -- your brief, Mr. Genender. You put
22 down that they --

23 MR. GENENDER: Yeah.

24 THE COURT: -- that they had --

25 MR. GENENDER: Yeah.

1 THE COURT: -- they had mentioned it, but hadn't
2 really --

3 MR. GENENDER: Then I --

4 THE COURT: -- raised it in the evidentiary hearing,
5 and I appreciate you bringing --

6 MR. GENENDER: I don't think -- I don't think my
7 comment earlier today was consistent with what was in our
8 brief, and I want to make sure that I am consistent with
9 what's correct and what's in our brief.

10 THE COURT: I appreciate that.

11 MR. GENENDER: Thank you. Okay.

12 THE COURT: So, if you all are both okay with that,
13 will you all upload an order that implements that, so that you
14 can -- especially the freezing. Everything else, I'm not
15 worried about, but I want to put that freezing part in
16 writing, so that there is an order that freezes things. So
17 why don't you just put all three features in writing and put
18 down how this notice will get filed and stuff like that? And
19 just upload an agreed order, if you would, as to form.

20 MR. GENENDER: Judge, are you -- sorry. Judge, Paul
21 Genender.

22 Are you contemplating simultaneous briefing next
23 Friday? If so, should we just pick a time?

24 THE COURT: Yeah. How about two o'clock, so that
25 you can't make an associate work late?

1 MR. GENENDER: I like that.

2 THE COURT: The guy that is sitting --

3 MR. GENENDER: I got a --

4 THE COURT: The guy that --

5 MR. GENENDER: -- couple of people --

6 THE COURT: -- is sitting off Mr. Duewall's left
7 shoulder just got a big smile on his face, right?

8 MR. DUEWALL: Well, Judge, I've got someone at two
9 o'clock and three o'clock from me that are both smiling, so
10 thank you.

11 THE COURT: Okay. Thank you.

12 So, on the motions to quash, if these commercial
13 meetings result in a resolution, do we still need that
14 discovery or will that moot the need for discovery?

15 MR. GENENDER: Well, Judge, we do need the
16 discovery. And that's -- that discovery is not under the
17 operating agreement; that discovery is under the PSA. And
18 that discovery relates to claims that the estate has against
19 BP and potentially Shell, investigating those claims for
20 delays, representations, et cetera, inducement, and actions
21 pre-petition and continuing, in connection with the PSA, in
22 connection with the delays to get Genovesa online.

23 THE COURT: No, I --

24 MR. GENENDER: And --

25 THE COURT: I got that, I just -- the fact is you're

1 not going to reach a commercial resolution with BP, I don't
2 think, that leaves those issues as an open issue. Those
3 people aren't going to -- neither Mr. Dane, nor Mr. Eaton are
4 going to -- they could. But in all likelihood, if you're
5 going to resolve things, you're going to resolve everything.

6 And Mr. Manns, why don't I invite you all to the
7 meeting, too? And let's have a commercial meeting that tries
8 to get everything out of the way, and then we'll come back on
9 the motions to quash. And in the meantime, I will suspend
10 performance, seeing if there's a commercial resolution. Does
11 that work?

12 MR. MANNS: I think that's a -- I think that's a
13 reasonable approach, Your Honor.

14 And if I could make a request, if we're going to
15 come back. And I know my schedule is probably the least
16 important of any of the parties on the call. But if we have
17 to come back for a hearing on that motion to quash issue, I'd
18 respectfully request that we not do it the week of July 19th,
19 if at all possible. I know I can discuss that with
20 Mr. Genender offline.

21 But I appreciate the Court's approach. I think
22 sending the parties to a meeting may offer a level of detente
23 that could perhaps -- well, how knows -- reach some of these
24 other issues, as well.

25 THE COURT: Mr. Manns, do you have any problem

1 bringing a client represent to a commercial meeting, so that
2 everything can be on the table?

3 MR. MANNS: I do not, Your Honor. I think that
4 would be productive, and I'll request my client to confirm.

5 THE COURT: So, Mr. Duewall, the earliest that I
6 will issue a ruling is going to be the 23rd of July on the
7 arbitration issue, by the time you brief it and then you all
8 have your meeting. So I'm not going to schedule a hearing on
9 the motion to quash until after I get a notice that the
10 meeting failed. So, if you don't mind, when you all file that
11 notice, if the meeting fails, tell me whether I need to set
12 hearings on the two motions to quash, and that, you know, the
13 parties are available on X date. If you all -- if the three
14 of you all will get on the phone with Ms. Do, she'll give you
15 a date when you're all available. I'm not going to schedule
16 this where you're not.

17 MR. MANNS: That sounds good, Your Honor. We will
18 do that.

19 MR. GENENDER: Your Honor, can I speak to this for a
20 moment, Your Honor?

21 THE COURT: Yes.

22 MR. GENENDER: Paul Genender for the Debtors.

23 I have -- the Debtors are fine with what you
24 outlined as it relates to the lift-stay arbitration motion.
25 As it relates to the 2004 motions, these are different issues

1 on different time lines. I noted in papers BP filed this
2 morning that they're taking issue with timing and the amount
3 of time -- we disagree with the amount of time. And I'm
4 concerned about that, I'm concerned about the Debtors being
5 prejudiced by the passage of even a couple of weeks before
6 getting Your Honor to address these issues.

7 We've submit -- these have been pending -- we served
8 drafts of them on May 14th, we served them on May 21st. And
9 we do -- we're -- there's a concern about us being prejudiced
10 if these aren't -- if these couldn't be addressed for a few
11 more weeks.

12 THE COURT: What's the prejudice?

13 MR. GENENDER: Your Honor, I think --

14 THE COURT: If the prejudice is these aren't going
15 to be your claims anymore, then that's not much prejudice
16 because it means you're going to waste your time by getting
17 the information.

18 MR. GENENDER: Well, they're going to be someone's
19 claims, Your Honor. And could I ask Your Honor take a short
20 recess, so I can visit with our clients on this issue.

21 THE COURT: No, I'm not going to change that ruling.
22 I'm going to postpone that decision. I want there to be a
23 commercial meeting. I got it that this may put somebody else
24 there. I'm perfectly empowered to allow discovery to occur by
25 the Debtor's successor if I caused the delay, so that it

1 couldn't happen.

2 MR. GENENDER: Right.

3 THE COURT: I don't know that I will do that, but
4 the law allows me to order, you know, pre-suit discovery in
5 any event. So let's not get too worried about who's going to
6 be in possession and control of the right to get information.
7 I don't see that what Shell and BP are doing is trying to run
8 out the clock on you. And I think that, if I say that you're
9 entitled to the information, they're going to give it to you.
10 We'll cross that bridge.

11 I want there to be a commercial meeting where we
12 have people that can reach a commercial decision without
13 having ongoing production under the 2004 right now. And I'm -
14 - you know I'm not very bashful about doing things, so I'm not
15 going to let the clock run out and that have a bad
16 consequence.

17 MR. GENENDER: Well, Judge, I appreciate your
18 comments. They, to a degree, assuage my concern, so I thank
19 the Court for that. And I don't know that I could ask -- I
20 mean, you've made your decision, so I'm not going to --

21 THE COURT: Yeah. I mean, look --

22 MR. GENENDER: I'm not going to --

23 THE COURT: -- Mister --

24 MR. GENENDER: -- argue with you.

25 THE COURT: -- Mr. Dane is here and you'll do your

1 job. Sorry, Dane, I'm just not going to do that today. I
2 want you all to meet and I want you to meet in good faith and
3 let's -- I know you've got a very busy schedule, as well,
4 trying to get things closed. So we may be a little optimistic
5 on getting this done in two weeks, as you're trying to get to
6 an effective date. But for the same reason, let's put
7 everything off.

8 Okay. Boy it's a mess. I sure appreciate the
9 quality of the argument that everybody made. And I am just
10 not prepared to be confident in a decision today, but we'll
11 get there and I'll get to a level of confidence where I can do
12 it.

13 Thank you. Good luck in your meeting. And we're in
14 adjournment.

15 (The parties thank the Court.)

16 (Proceedings concluded at 11:22 a.m.)

17 * * * * *

18 *I certify that the foregoing is a correct transcript*
19 *to the best of my ability due to the condition of the*
20 *electronic sound recording of the ZOOM/telephonic proceedings*
21 *in the above-entitled matter.*

22 /S./ MARY D. HENRY

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